

1 HONORABLE RICHARD A. JONES
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 PHILLIP MIGLIO,
10 Plaintiff,

11 v.
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13 UNITED AIRLINES,
14 Defendant.

CASE NO. C13-573RAJ

ORDER

14 **I. INTRODUCTION**

15 This matter comes before the court on Plaintiff's motion for reconsideration and
16 Defendant's motion to dismiss for lack of subject matter jurisdiction. No one requested
17 oral argument, and the court finds oral argument unnecessary. For the reasons stated
18 below, the court DENIES both motions. Dkt. ## 9, 27. The clerk shall TERMINATE the
19 August 30, 2013 motion calendar that the court created to address the motion to dismiss.

20 **II. BACKGROUND**

21 For purposes of these motions, the court can accept as true the allegations of
22 Plaintiff Phillip Miglio's complaint. He worked in the Seattle area as a baggage handler
23 for Defendant United Airlines ("United"). When he attempted to return to work two
24 weeks after an on-the-job shoulder injury in 2009, United told him that there was no work
25 available to him that would meet the "light duty" restrictions that Mr. Miglio's physician

1 recommended. Mr. Miglio's physician recommended shoulder surgery in December
2 2009, but United delayed approval of the surgery until September 2010.

3 Mr. Miglio's physician cleared him for regular duty, subject to a four-hours-per-
4 day work restriction, in August 2011. United required him to perform various physical
5 tests before he could return to work. Mr. Miglio reinjured himself during the tests.
6 Although Mr. Miglio claimed he could work subject to some restrictions, United did not
7 find work that would accommodate those restrictions.

8 Mr. Miglio's physician cleared him to return to work without restriction in August
9 2012. This time, United required Mr. Miglio to undergo an independent medical
10 examination. The physician who performed the evaluation declared that he could not
11 offer an opinion on Mr. Miglio's fitness for work without receiving documentation of his
12 prior injuries. Mr. Miglio contends that United refused to provide the documentation the
13 physician needed.

14 United fired Mr. Miglio in September 2012, explaining both that Mr. Miglio had
15 not proven that he was able to return to work and that Mr. Miglio had used up all of the
16 "extended illness status" available to him.

17 Another physician declared that Mr. Miglio could work without restrictions in
18 November 2012. United refused to reconsider its decision to fire Mr. Miglio.

19 Mr. Miglio sued United in King County Superior Court for disability
20 discrimination in violation of the Washington Law Against Discrimination ("WLAD"),
21 RCW Ch. 49.60. United removed the case here, invoking the court's diversity
22 jurisdiction. *See* 28 U.S.C. § 1332(a).

23 In August 2013, the court issued an order denying Mr. Miglio's motion to remand
24 to King County Superior Court. Aug. 27, 2013 ord. (Dkt. # 25). The sole question
25 relevant to the motion to remand was whether Mr. Miglio had fraudulently joined two
26 Washington-based United employees in order to defeat diversity jurisdiction. The court
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1 ruled that he had, concluding that United had proven by clear and convincing evidence
2 that neither employee could be individually liable under the WLAD.

3 Now before the court are two motions. Mr. Miglio asks the court to reconsider the
4 August 27 order and remand this action to King County Superior Court. Alternatively, he
5 asks the court to certify the August 27 order for an interlocutory appeal. United, for its
6 part, has moved to dismiss this action for lack of subject matter jurisdiction. United
7 contends that the federal Railway Labor Act (“RLA”) preempts Mr. Miglio’s WLAD
8 claims because those claims require interpretation of the collective bargaining agreement
9 (“CBA”) between Mr. Miglio’s union and United.

10 III. ANALYSIS

11 A. Motion for Reconsideration

12 Motions for reconsideration are “disfavored,” and the court will deny one unless a
13 party shows “manifest error” in the prior order or points to “new facts or legal authority
14 which could not have been brought to [the court’s] attention earlier with reasonable
15 diligence” that warrant a different result. Local Rules W.D. Wash. LCR 7(h)(1).

16 Mr. Miglio points neither to new facts nor to new legal authority; he argues only
17 that the court erred when it ruled that employees who merely carry out the discriminatory
18 decisions of their supervisors cannot be individually liable under the WLAD. The court
19 disagrees, for the reasons stated in the August 27 order as well as the reasons stated here.

20 Mr. Miglio renews his focus on the language of the WLAD, attempting to parse
21 the holding in *Brown v. Scott Worldwide Paper Co.*, 20 P.3d 921 (Wash. 2001). The
22 court already addressed *Brown* in the August 27 order. Now, Mr. Miglio points out that
23 the *Brown* court observed that the WLAD makes an “employer” liable for various
24 wrongful acts, including disability discrimination. RCW 49.60.180(3). It further defines
25 an “employer” as “any person acting in the interest of an employer, directly or
26 indirectly . . .” RCW 49.60.040(11). Mr. Miglio asserts, as he did unsuccessfully when

1 he moved to remand, that since the two individual employees to whom he pointed were
2 acting in the interest of United when they carried out the discriminatory decisions of their
3 Chicago-based superiors, they are liable. His assertion turns the statute upside down.
4 People acting in the interest of an employer can be individually liable via the WLAD, *but*
5 *only if they violate the WLAD*. Putting aside a discrimination claim invoking a disparate
6 impact theory, a plaintiff claiming employment discrimination must prove intentional
7 discrimination. *E-Z Loader Boat Trailers v. Travelers Indem. Co.*, 726 P.2d 439, 444
8 (Wash. 1986); *see also Hegwine v. Longview Fibre Co.*, 172 P.3d 688, 697 (Wash. 2007)
9 (noting that “burden of persuasion always remains with the employee to show intentional
10 discrimination”). An employee who merely carries out the instructions of her superiors
11 lacks the intent necessary for discrimination. Instead, her intent is to carry out her
12 superior’s instructions. There may be instances in which an employee carrying out a
13 superior’s instructions shares the superior’s discriminatory intent, but as the court noted
14 in the August 27 order, this is not such a case.

15 Like the *Brown* court, Mr. Miglio also points to RCW 49.60.220, which makes it
16 unlawful to “aid, abet, encourage, or incite the commission of any unfair practice”
17 proscribed by the WLAD. He ignores that aiding and abetting, within the meaning of the
18 WLAD, requires that the “individual in question has engaged in a transaction in which he
19 would not otherwise have engaged . . . for the purpose of assisting . . . discrimination.”
20 *Rudy v. Hollis*, 500 P.2d 97, 101 (Wash. 1972); *see also Woods v. Graphic Comm’ns*, 925
21 F.2d 1195, 1200 n.3 (9th Cir. 1991) (“A violation of [RCW 49.60.220] requires more
22 than mere knowledge that discrimination has occurred. To violate the statute, a party
23 must participate in a discriminatory activity for the *purpose* of discriminating.”)
24 (emphasis in original). An employee who merely carries out the discriminatory
25 instructions of a superior is not liable for aiding and abetting discrimination.

1 Finally, Mr. Miglio attempts to liken his claims to the claims of the employee in
2 *Raymond v. Pac. Chem.*, 992 P.2d 517, 523 (Wash. Ct. App. 1999), one of the two
3 appeals that the *Brown* court resolved. The *Raymond* court was not considering a claim
4 against an employee who had merely carried out the instructions of her superiors, it was
5 considering a claim against supervisors “who [had] commit[ted] age discrimination.” *Id.*
6 In reversing *Raymond*, the *Brown* court had no reason to consider whether an employee
7 who merely follows instructions has committed discrimination. Indeed, Mr. Miglio has
8 presented no case in which a subordinate employee was held liable under the WLAD
9 merely for following her superior’s instructions.

10 For these reasons, and for the reasons stated in the August 27 order, the court
11 declines to reconsider that order. The court also declines to certify that order for
12 immediate appeal. The court does not believe that there is “substantial ground for
13 difference of opinion” as to the controlling question of law that that Mr. Miglio presents –
14 whether the WLAD assigns liability to employees who merely carry out the instructions
15 of their superiors. *See* 28 U.S.C. § 1292(b) (guiding district court’s discretion in
16 certifying an otherwise non-appealable interlocutory order for immediate appeal). Mr.
17 Miglio’s view of the WLAD would place employees with no discriminatory intent in an
18 unconscionable bind: either refuse to carry out the discriminatory instructions of their
19 superiors and face adverse consequences, or follow those instructions and face liability
20 for discrimination. Neither the WLAD, the Washington Supreme Court’s interpretation
21 of it in *Brown*, nor any other authority Mr. Miglio has cited supports foisting that
22 Hobson’s choice on Washingtonian workers.

23 **B. Motion to Dismiss**

24 The sole issue that United’s motion to dismiss properly raises is that the RLA
25 preempts Mr. Miglio’s WLAD claim. United did not contend that the court should

1 compel arbitration of this case in accordance with the CBA. United also did not contend
2 that Mr. Miglio waived, via the CBA, his right to bring a WLAD suit.

3 The RLA, which Congress extended to cover the airline industry in 1936, is
4 designed to stabilize labor-management relations via a comprehensive dispute resolution
5 process. *Espinal v. NW Airlines*, 90 F.3d 1452, 1455-56 (9th Cir. 1996). In particular, it
6 “establishes a mandatory arbitral mechanism for ‘the prompt and orderly settlement’ of
7 two classes of disputes.” *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994)
8 (quoting 45 U.S.C. § 151a). So-called “major disputes” are those over the formation of
9 CBAs or efforts to secure them, whereas “minor disputes” are those over the
10 interpretation or application of agreements covering rates of pay, rules, or working
11 conditions. *Id.* at 252-253.

12 The RLA preempts state-law causes of action to resolve minor disputes. *Norris*,
13 512 U.S. at 253. The difficulty in applying this straightforward proposition is in
14 distinguishing minor disputes – *i.e.*, suits arising out of an interpretation of a CBA – from
15 other disputes. Courts confront essentially the same issue in considering the preemptive
16 effect of Section 301 of the Labor Management Relations Act (“LMRA”), 29 U.S.C.
17 § 185. *Norris*, 512 U.S. at 260, 263 n.9.

18 In *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1059-60 (9th Cir. 2007), the
19 court (addressing the LMRA) established a two-step preemption inquiry. First, a court
20 must determine “whether the asserted cause of action involves a right conferred upon an
21 employee by virtue of state law, not by a CBA.” *Id.* at 1059. If the right arises solely
22 from the CBA, the claim is preempted. *Id.* If the right does not arise solely from the
23 CBA, a court must consider whether the right is “substantially dependent on the terms of
24 a CBA.” *Id.* at 1060 (internal quotation omitted). A minor dispute within the scope of
25 the RLA is one that depends substantially on the terms of a CBA. *Saridakis v. United*
26 *Airlines*, 166 F.3d 1272, 1276 (9th Cir. 1999).

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1 There is no serious dispute that Mr. Miglio's WLAD disability discrimination
 2 claim is one based on rights conferred by Washington law, not any CBA; but there is also
 3 no serious dispute that his WLAD claim at least implicates a CBA. Although his
 4 complaint does not mention the CBA between United and his union, he cannot avoid it.
 5 For example, he admits that one of the reasons United offered for terminating him was
 6 that he had "been on 'extended illness status' for the maximum period of time proscribed
 7 by company policy." Compl. ¶ 35. "Extended illness status," in turn, is a term of art
 8 from the CBA.¹ United's contention is that it fired Mr. Miglio not because he had a
 9 disability, but because the CBA dictated his firing because he had exhausted his extended
 10 illness status. Similarly, United contends that it is the CBA that dictates whether it is Mr.
 11 Miglio or United who was responsible for providing additional documentation to the
 12 physician who performed the 2012 independent medical examination. Moreover, it was
 13 the CBA, in United's view, that prevented it from giving Mr. Miglio the modified duty
 14 assignments that his various injuries required.

15 In deciding whether a state law right is "substantially dependent" on the terms of a
 16 CBA at step two of the *Burnside* analysis, the court must determine whether it can
 17 resolve the dispute by "looking to" rather than "interpreting" the CBA. 491 F.3d at 1053.
 18 That a CBA bears on the resolution of a state-law claim is insufficient to preempt the
 19 claim, it must be necessary to resolve competing interpretations of the CBA. Take, for
 20 example, United's contention that the CBA required it to terminate Mr. Miglio because

21 ¹ United provided the CBA in connection with its motion to dismiss. Dziepak Decl. (Dkt. # 10),
 22 Ex. A. Curiously, United styled its motion to dismiss as one challenging the court's subject
 23 matter over this dispute. Whether the RLA preempts Mr. Miglio's state law claims or not, the
 24 court has subject matter jurisdiction. A preempted claim is not one over which the court lacks
 25 subject matter jurisdiction, it is simply a claim for which the court cannot grant relief. United's
 26 motion is, properly speaking, a motion to dismiss for failure to state a claim. Fed. R. Civ. P.
 27 12(b)(6). In resolving a Rule 12(b)(6) motion, a court typically cannot consider evidence beyond
 28 the four corners of a complaint, although it may rely on a document to which the complaint
 refers if it is central to the claim presented and its authenticity is not in question. *Marder v.
 Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). The court assumes, for purposes of this motion, that
 Mr. Miglio's complaint implicitly incorporates the CBA.

1 he had exhausted his “extended illness status.” Mr. Miglio cannot dispute United’s
2 interpretation of the CBA, to do so would be to assert a preempted dispute. But to pursue
3 his WLAD claim successfully, he does not have to dispute United’s interpretation of the
4 CBA. He could concede that the CBA mandated his termination and nonetheless contend
5 that United terminated him because of his disability in violation of Washington law. To
6 the extent that United believes that compliance with the CBA is a defense to a WLAD
7 claim, it is either mistaken or it has offered no authority to support that assertion.
8 Imagine, for example, a CBA dictating that “any employee with a disability will be
9 fired.” If United followed that CBA, it would violate Washington law.

10 At this stage of the litigation, United has pointed to no dispute over the
11 interpretation of the CBA that will *necessarily* arise in the course of this litigation. To
12 the extent that such a dispute arises, which will presumably occur only if Mr. Miglio
13 decides to argue with United’s interpretation of the CBA, United is free to assert that the
14 RLA preempts that dispute. But it is entirely possible for Mr. Miglio to litigate this suit
15 in a way that does not require interpretation of the CBA. For that reason, the court
16 declines to dismiss his WLAD claim.

17 Before concluding, the court observes (as did Mr. Miglio) that United presented a
18 new argument in its reply brief. It invoked *Miller v. AT&T Network Sys.*, 850 F.2d 543,
19 548 (9th Cir. 1988), and its three-part inquiry for assessing preemption of state law
20 claims that implicate the terms of a CBA. The court does not suggest that United would
21 have prevailed had it made this argument in its initial motion. It merely rules that United
22 was required to raise this issue in its initial motion, rather than in its reply brief.

23 IV. CONCLUSION

24 For the reasons stated above, the court DENIES both Mr. Miglio’s motion for
25 reconsideration and United’s motion to dismiss. Dkt. ## 9, 27. The clerk shall

1 TERMINATE the August 30, 2013 motion calendar that the court created to address the
2 motion to dismiss.

3 DATED this 17th day of March, 2014.

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7 The Honorable Richard A. Jones
8 United States District Court Judge
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